

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

v.

JAWONE SELBY,

Defendant.

)
)
) Case No. 1802011394
)
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)

OPINION

Date Submitted: April 25, 2018

Date Decided: July 31, 2018

*Upon Defendant Jawone Selby's Motion to Sever Offenses: **GRANTED in part,**
and DENIED in part.*

John S. Taylor, Esquire, Department of Justice, Carvel State Office Building, 820 North French Street, Wilmington, Delaware, Deputy Attorney General.

Christina L. Ruggiero, Esquire, and Eugene J. Maurer, Jr., Esquire, 1201-A King Street, Wilmington, Delaware, Attorneys for Defendant.

Jurden, P.J.

I. FACTUAL BACKGROUND

On February 26, 2018, Jawone Selby, was indicted for Robbery First Degree, two counts of Possession of a Firearm During the Commission of a Felony, Conspiracy Second Degree, Wearing a Disguise During the Commission of a Felony, Resisting Arrest, Assault Second Degree, Possession of a Firearm by a Person Prohibited (“PFBPP”), and Possession of Ammunition by a Person Prohibited (“PABPP”).¹ The charges stem from a February 17, 2018 robbery Selby allegedly committed with Jarrett Roane and Khalier Ross. Pending before the Court is Selby’s Motion to Sever Offenses, pursuant to Superior Court Criminal Rule 14. For the reasons that follow, Selby’s Motion to Sever Offenses is **GRANTED in part, and DENIED in part.**

II. STANDARD OF REVIEW

The decision to grant or deny a motion to sever rests in the sound discretion of the trial court.² On a motion to sever, the defendant bears the burden of demonstrating unfair prejudice and substantial injustice associated with the joinder.³ The defendant cannot rely upon hypothetical prejudice; he must demonstrate that

¹ Def.’s Mot. to Sever Offenses ¶ 1 (D.I. 13).

² *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988); *Younger v. State*, 496 A.2d 546, 549–50 (Del. 1985); *Lampkins v. State*, 465 A.2d 785, 794 (1983); *Floudiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999).

³ *State v. Hartman*, 2000 WL 33109146, at *2 (Del. Super. Aug. 24, 2000); *Bates v. State*, 386 A.2d 1139, 1142 (Del. 1978); *Floudiotis*, 726 A.2d at 1210.

prejudice will in fact result from the joinder.⁴ Whether severance is appropriate depends on the facts and circumstances of each case.⁵ “Ultimately, the Court must balance the rights of the accused against the legitimate concern for judicial economy.”⁶

III. DISCUSSION

Selby is charged with status-based crimes, i.e., PFBPP and PABPP, because in July 2017 he was convicted of Attempted Robbery Second Degree, Assault Second Degree, and Robbery Second Degree. He argues his PFBPP and PABPP offenses should be tried separately because the State will be required to present evidence of these prior convictions and such evidence would create unfair prejudice.⁷ He further contends that if the Court decides to sever his status-based crimes, evidence of his prior convictions would not be admissible in the trial of his remaining counts.

The State concedes that there is merit to Selby’s Motion to Sever Offenses, but does not agree that a second trial and jury are warranted.⁸ Accordingly, the State offers three alternatives to severance: (1) sanitization/stipulation; (2) a simultaneous

⁴ See *Skinner v. State*, 575 A.2d 1108, 1118 (Del. 1990) (“[M]ere hypothetical prejudice is not sufficient.”); see also *Floudiotis*, 726 A.2d at 1210.

⁵ See *Wiest*, 542 A.2d at 1195.

⁶ *Ashley v. State*, 85 A.3d 81, 85 (Del. 2014) (citing *Mayer v. State*, 320 A.2d 713, 717 (Del. 1974)).

⁷ Def.’s Mot. to Sever Offenses ¶ 4–5.

⁸ State’s Answering Br. to Mot. to Sever Offenses ¶ 1 (D.I. 24).

bench trial; or (3) a bifurcated jury trial with the same jury.⁹ The State avers that each alternative provides “a just, prejudice-free adjudication.”¹⁰

When crimes are of the same or substantial character, based upon the same act, or represent a common plan or scheme, Delaware Superior Court Criminal Rule 8(a) allows the State to join the offenses and prosecute the defendant in one trial for different counts.¹¹ The purpose of the joinder of offenses is to promote judicial economy.¹² When joining the offenses will prejudice the State or the accused, however, one trial is not appropriate and, pursuant to Delaware Superior Court Criminal Rule 14, severance may be granted.¹³

The prejudice which a defendant may suffer from a joinder of offenses is described in the following three situations: (1) the jury may cumulate the evidence

⁹ *Id.* at ¶ 2.

¹⁰ *Id.*

¹¹ Super. Ct. Crim. R. 8(a), provides:

Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

¹² *Wiest*, 542 A.2d at 1195.

¹³ Super. Ct. Crim. R. 14, states:

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

of the various crimes charged and find guilt when, if considered separately, it would not so find; (2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and (3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.¹⁴ When considering the prejudice to a defendant, the Court also examines whether the evidence would be admissible in the severed trial for a proper purpose under Rule 404(b).¹⁵ “Although reciprocal admissibility is not a prerequisite for initial joinder,” if the evidence supporting one charge would be admitted in a trial of the other charges, it is less likely that joinder will cause prejudice.¹⁶

Selby’s situation falls squarely within the second type of prejudice described above. 11 *Del. C.* § 1148(a), the statute criminalizing the possession and purchase of firearms and ammunition by “persons prohibited,” requires the State to show that the defendant was convicted of another crime.”¹⁷ When crimes include a prior-conviction element, there can be little question that evidence of the prior offense generally carries a risk of unfair prejudice to the defendant.¹⁸ Given the fact that

¹⁴ *Ashley*, 85 A.3d at 84–85.

¹⁵ *Skinner*, 575 A.2d at 1118; *Bates*, 386 A.2d at 1142.

¹⁶ *See Skinner*, 575 A.2d at 1118; *Bates*, 386 A.2d at 1142 (“[W]here evidence concerning one crime would be admissible in the trial of another crime...there is no prejudicial effect in having a joint trial.”).

¹⁷ *Monceaux v. State*, 51 A.3d 474, 478 (Del. 2012).

¹⁸ *See Old Chief v. United States*, 519 U.S. 172, 185 (1997).

proof of PFBPP and PABPP will involve presentation of Selby's prior criminal record, the jury in this case may be unable to compartmentalize their judgment of guilt or innocence with regard to each separate count of the indictment and infer a general criminal disposition.¹⁹

The Court has cured prejudice which arises from prior-conviction element crimes by requiring a redacted charging document and bifurcating the trial.²⁰ This is exactly the procedure the Court followed in *Monceaux v. State* and *Drummond v. State*.²¹ Both cases involved defendants who were convicted sex offenders who had been charged with new sex offenses involving a child victim. Each defendant was charged with the new sex charges and a charge of Sex Offender Unlawful Sexual Conduct Against a Child.²² The underlying conduct in each case that gave rise to the new sex charges had no factual relationship whatsoever to the fact that the defendant was a convicted sex offender. Nevertheless, the defendants argued they were prejudiced because the State was required to produce evidence of their sex offender status in a criminal proceeding of another sexual offense. The Delaware Supreme Court held that, under such circumstances, "bifurcating the trial and

¹⁹ See *State v. Loper*, 1990 WL 91087, at *1 (Del. Super. June 19, 1990).

²⁰ See *Monceaux*, 51 A.3d at 478.

²¹ *Drummond*, 56 A.3d 1038 (Del. 2012).

²² 11 Del. C. § 777A.

redacting the charging document—moots the significant constitutional issue...raised.”²³

Similar to the aforementioned cases, Selby’s new charges have no factual relationship to his prior convictions that make him a “person prohibited.” Therefore, in order to avoid potential prejudice stemming from joinder of the offenses, the Court will have a bifurcated jury trial with the same jury. Bifurcation is efficient and eliminates prejudice to Selby.²⁴ Furthermore, the Court is well within its discretion by allowing the same jury to sit for both trials because the charges against Selby are “inextricably intertwined” and “based on the same act or transaction or on two or more acts or transactions connected together.”²⁵ Thus, Selby’s Motion to Sever Offenses is **GRANTED in part, and DENIED in part.**

IV. CONCLUSION

NOW, THEREFORE, based upon the foregoing, Defendant Jawone Selby’s Motion to Sever Offenses is **GRANTED in part, and DENIED in part.** The Court will follow the *Monceaux* approach at trial: the PFBPP and PABPP charges will be

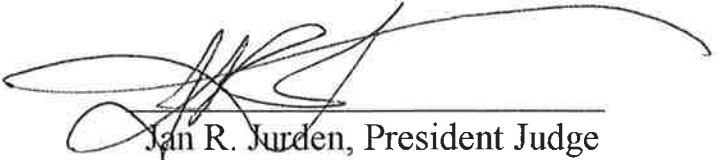
²³ *Monceaux*, 51 A.3d at 478 (holding *Getz v. State* supports its decision to affirm the Superior Court’s bifurcation of the defendant’s trial). The Delaware Supreme Court held that “bifurcation is required for all future trials under [11 Del. C. § 777A.]” Trial judges are not required to hold bifurcated trials to establish that a defendant is a “person prohibited” under 11 Del. C. § 1148, but it is generally within their discretion to do so when there exists a potential for substantial prejudice.

²⁴ See *Monceaux*, 51 A.3d at 478 (“A bifurcated trial and redacted charge eliminate the alleged conflict between [the statute] and the defendant’s due process rights.”).

²⁵ See *Justiano v. State*, 2018 WL 2072816, at *3 (Del. 2018) (TABLE).

redacted in the re-indictment provided to the jury, and the trial will be bifurcated in order for Selby's PFBPP and PABPP charges to be tried by the same jury, separately.

IT IS SO ORDERED.



Jan R. Jurden, President Judge

Original to Prothonotary

cc: John S. Taylor, Esq.
Christina L. Ruggiero, Esq.
Eugene J. Maurer, Jr., Esq.